UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION
- - -

UNITED STATES OF AMERICA,	:	Case No. 1:20-cr-142
Plaintiff,	:	**Motion To Dismiss**
- v -	:	via GoToMeeting
ALEXANDER SITTENFELD,	:	Tuesday, February 16, 2021
a/k/a "P.G. Sittenfeld,"	:	2:00 p.m.
Defendant.	:	Cincinnati, Ohio

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TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE DOUGLAS R. COLE, JUDGE

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P R O C E E D I N G S

(In open court via GoToMeeting at 2:02 p.m.)

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COURTROOM DEPUTY: Good afternoon. This is Scott Lang, Judge Cole's courtroom deputy. Looks like we have a lot of people listening in through their phones. If you could please mute your audio on your phones, that would be very helpful.

As for the parties to the case, I'm not seeing any video from any of the counsel.

Okay. All right. Good.

Mr. Charlie H. Rittgers, are you --

MR. H. RITTGERS: I'm here.

COURTROOM DEPUTY: -- able to get video or no?

MR. H. RITTGERS: I can see everybody. I don't know why --

MR. M. RITTGERS: Bottom middle, Dad. It says camera. Click on camera.

MR. H. RITTGERS: It's up -- for me it's up on top, but I'm clicking on camera. I've hit the button about five times here.

COURTROOM DEPUTY: It's okay. I'll let the judge know that you are having problems with your video, but I have a feeling he will be fine without you being on the video, since you're not going to be the one that's going to be

proceeding on the motion.

I'm going to go through and make sure everyone on the video portion can hear me.

Ms. Gaffney, can you hear me?

MS. GAFFNEY: Yes.

COURTROOM DEPUTY: Mr. Singer, can you hear me?

MR. SINGER: Yes.

COURTROOM DEPUTY: And Mr. Sittenfeld, can you hear me?

MR. SITTENFELD: Yes.

COURTROOM DEPUTY: Mr. Charlie H. Rittgers, can you hear me?

MR. H. RITTGERS: I can.

COURTROOM DEPUTY: Charlie M. Rittgers, can you hear me?

MR. M. RITTGERS: Yes.

COURTROOM DEPUTY: Mr. Dreeben, can you hear me?

MR. DREEBEN: I can. Thank you.

COURTROOM DEPUTY: And Sue, can you hear me?

THE COURT REPORTER: Yes. I can hear you. Thank you.

COURTROOM DEPUTY: For those callers who joined, if you could please mute your phones, we'd appreciate that. There's going to be a lot of people on this call, so we want to make sure that we don't have any issues with the audio.

Mr. Singer, will Ms. Glatfelter be joining us?

MR. SINGER: Yes. AUSA Glatfelter is here.

COURTROOM DEPUTY: She is. Okay. Is she in your office, or --

MR. SINGER: She is.

COURTROOM DEPUTY: Okay. Are you ready to proceed?

MR. SINGER: The government's ready.

COURTROOM DEPUTY: Mr. Dreeben, are you ready?

MR. DREEBEN: We are, Your Honor.

COURTROOM DEPUTY: In addition to obviously all the callers, those who are participating by video, if you could please mute your audio as well until you are speaking. That way, that will hopefully help alleviate any audio issues, and I will let the judge know we are ready to proceed.

THE COURT: Good afternoon. We're here this afternoon in the matter of the United States of America versus Alexander Sittenfeld. It's Case Number 1:20-cr-142, and we're here this afternoon on the defendant's motion to dismiss the indictment.

If I could ask counsel to please enter their appearances for the record.

MR. SINGER: Good afternoon, Your Honor. Matt Singer, Emily Glatfelter, and Megan Gaffney for the United States.

THE COURT: Good afternoon.

MR. DREEBEN: Good afternoon, Your Honor. Michael Dreeben, with Charles H. and Charles M. Rittgers, for Alexander "P.G." Sittenfeld.

THE COURT: Good afternoon, Mr. Dreeben.

Well, a couple things before we get started. First, I will note that there are some people who are dialed in as well this afternoon. This is open court, albeit virtually open court, but I will note for anyone listening that pursuant to local rule, there is no recording allowed of today's session of court. So please turn off any recording devices that you may be using.

And second, I know I do not need to tell this to counsel, but for anyone else listening, the question today is not whether the defendant in this action is innocent of the charges. The question is whether the indictment is sufficient.

And today, there's going to be a lot of talk about the allegations in the indictment. I want to note up front that these are allegations. They have not been proven, and the fact that the Court refers to these allegations today should not be understood by anyone that the Court's suggesting or implying that the allegations in the indictment are true.

Mr. Sittenfeld, as is the case with all criminal defendants, is presumed innocent of all charges until such time as he is proven guilty, and I certainly wouldn't want

anything the Court said today to suggest anything to the contrary in that regard.

So with that, Mr. Dreeben, I assume you're speaking for the defense today, given that you were the one who gave the names for the appearance. It is the defendant's motion, so I would be happy to hear from the defendant at this point.

MR. DREEBEN: Thank you, Your Honor.

We move to dismiss this indictment for the fundamental reason that its allegations do not state the offenses charged.

The government has filed a detailed indictment in this case, with multiple factual allegations about the interactions of Mr. Sittenfeld, an elected member of the Cincinnati City Council, with a confidential informant and undercover agents acting as investors in a development project.

The Court can evaluate the legal sufficiency of these allegations. The question here is not solely, as the government submits, whether the indictment provides adequate notice.

The first legal topic that I want to talk about today is why, when the government submits additional detailed allegations, the Court has the power and a responsibility to determine whether they state the offense charged. We do not believe that they do.

The fundamental flaw in this indictment is that it takes actions that are customary in our democratic system, the

discussion of policies and actions that an elected official has taken and intends to take, in the same conversations in which funds are solicited for political campaign purposes.

As the Supreme Court recognized in *McCormick versus United States*, and as I believe the government recognizes in this case as well in its brief in opposition, the simultaneous or near simultaneous discussions of the policies that an elected official pursues and the actions that he intends to take while soliciting campaign funds is not a criminal offense. The Court made that clear under the Hobbs Act.

I believe that the government agrees that the same standard applies under the honest services charges in this indictment, and we will argue that they equally apply under the program bribery provisions under Section 666 of Title 18.

In our view --

THE COURT: Mr. Dreeben, if I could interrupt just briefly.

MR. DREEBEN: Of course.

THE COURT: Before we get into some of these more specific questions, I was hoping you could help me a little bit understand your proposed framework for assessing the sufficiency of the Complaint.

And I think, as I read *Hamling*, going all the way back to *Hamling*, it looks like there's sort of some sense of a general offense and a specific offense and that you need to -- the

statute itself, I think the quote from *Hamling* is "The language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense coming under the general description with which he is charged."

So it seems like there's this concept running around of kind of the general offense, which is the statutory elements of an offense. And then there's something about the specific offense, and you need to give enough in the statement of facts and circumstances to meet that.

And then, in doing so, as I think part of your argument is, you may unwittingly get to a point where you've sort of pled yourself out of court, almost sort of under an old *Conley versus Gibson* notion of, well, now you've done it. You've managed to set forth facts that show you don't have a claim, and so you've kind of pled yourself out of court.

And I think, as I understand your argument, that's sort of the argument you're making, that there's some set of facts that the government needs to show. And then, in doing so, they may unwittingly go farther than they need to; or, in any event, may, in setting forth facts, show some facts that are inconsistent with criminality and thus have pled themselves out of court.

So do I understand the general framework that you're

positing pretty well?

MR. DREEBEN: Yes. I think that that's exactly right, that there's a hazy borderline on how much specificity the government needs to provide in order to comply with the general *Hamling* standard that Your Honor read.

But I think that it is clear that when the government does go beyond that and provides specific facts, the question for the Court is whether those specific facts add up to the offense charged.

And that standard is well stated in a Third Circuit case that we cited, which includes the following language: "If the specific facts that are alleged fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation, the indictment fails to state an offense."

And the Sixth Circuit has adopted that same principle and applied it in a case in which an indictment was brought for threats. This is *United States versus Landham*, which we've cited, that --

UNIDENTIFIED SPEAKER: Thank you. Thanks.

MR. DREEBEN: -- and the Court's holding in that case was not that the government had failed to allege the statutory elements, which is the bare minimum, or describe the circumstances and facts that it believed supported the charged offense, but that, in fact, the language that it used to allege threats failed to provide the necessary elements of the

crime and, in fact, fell outside of it.

And just briefly, it's worth noting that this was true in two respects. One, the government claimed that there was a threat to kidnap the defendant's child. And the Court looked at the entire context of the charge and concluded that the language actually referred to a custody battle, not to a kidnapping claim.

And in a second threat allegation, the government claimed that the defendant was threatening bodily harm, and the Court read again the entire context of the specific language and said, actually, the defendant was referring to past acts that involved words, not future acts involving bodily harm.

THE COURT: And I think that's a great point, Mr. Dreeben, and I'd like to sort of focus on that line of the case. And I'd also like to focus on what you said in the reply brief on page ID 331, which is page 3 of your reply brief, where you say, quote, where an indictment goes beyond reciting the elements of the specific offense and relies on particular factual --

UNIDENTIFIED SPEAKER: (Indiscernible).

THE COURT: Could everyone please mute their phones or video feed. Thank you.

"Where an indictment goes beyond reciting the elements of an offense and relies on particular factual allegations, an indictment must be dismissed if those factual allegations are

legally insufficient or inconsistent with the alleged offense."

And I'm wondering, it almost seems like those are two different things, "legally insufficient" or "inconsistent with."

And it seems to me that *Landham* is more of an "inconsistent with" case. In other words, in *Landham*, they said, well, it's legally impossible for a parent to kidnap a child; ergo, the allegations in the indictment prove that no offense or no -- the charged offense did not occur.

And that seems to be different from a case where maybe you're just saying, well, there aren't, you know, specific facts for each of the elements. It's insufficient in some ways, but we're not saying we couldn't prove some additional facts beyond those set forth in the indictment that would show that the crime occurred.

And so I'm wondering if you can comment a little bit on that, and if "legally insufficient" and "inconsistent with" are sort of two different things and whether "inconsistent with" might be the actual test here. In other words, based on what the government has alleged, is it legally impossible to conclude that a crime occurred?

MR. DREEBEN: Your Honor, I think that that is a legitimate distinction, and it does apply to the element of the kidnapping that you described, the legal impossibility.

I think that the Sixth Circuit went beyond that and also said that the context revealed that this was a bad custody battle, rather than an actual attempt to kidnap.

And in the second count that the Court (distorted audio), where it looked at the specific language and concluded that the defendant -- it said something like the things that have been done to you with a Parker pen are worse than some other things that have been done to you.

And the Court said, well, factually, things that are in the past that have been done to you are not threats of future bodily harm. And the context reveals he's talking about words that he's written down with a pen, rather than the threat of bodily injury that was requisite for the statute.

THE COURT: In both of those situations, Mr. Dreeben, it seems like the facts alleged in the indictment showed that it would be impossible to conclude that the crime occurred when you prove the facts.

You know, if we take the government's allegations as true, there's no longer any way you could possibly find that the defendant had violated the law, right? You would conclude that about *Landham?*

MR. DREEBEN: Yes, but I think that the case stands for a slightly broader principle than that, which is that in an area such as this, where you're dealing with curse speech in the threats case -- and in our case, the government has

chosen to charge political contributions as part of a quid pro quo -- there are First Amendment concerns that require the government to plead with enough context so that the Court can conclude that if the government proves everything that it says, it will have met the legal standards for the criminal offense.

And that's also a principle that the Sixth Circuit recognizes in the *Superior Growers* case that --

THE COURT: It will have or it may have? That, I think, is what I'm stuck on. It will have proven the offense or it may have proven the offense?

MR. DREEBEN: Well, and I think that the language in *Superior Growers* is "To be legally sufficient, the indictment must assert facts which in law constitute an offense; and which, if proved, would establish prima facie the defendant's commission of that crime."

So it's, I believe, not a sufficiency of the evidence test. Surely the government would come back and say, We'll have more evidence to introduce. That's not the Court's role. But the Court's role, I think, at this stage is to lay the legal standard on top of the indictment and ask whether, if the government proves what it has alleged, has it crossed the threshold? Has it provided the context so that in an area of extreme sensitivity, the criminalization of politics, can the Court conclude that the government has actually alleged the

crime charged?

And there are reasons, which I think we can talk about later, and I do want to stay with this issue, but there are reasons why it's particularly important that the government not be free to make allegations that can take what we believe is customary political activity and criminalize it unless it meets the explicitness standard that the Supreme Court articulated in the *McCormick* case, and it has overcome the presumption of legitimacy that campaign contributions have in our system, even when they are solicited -- and frequently will be -- on the basis of what the political figure has done or intends to do.

And the presumption --

THE COURT: Well --

MR. DREEBEN: -- of legitimacy language, I realize this is the substantive point -- I'm sorry, Your Honor.

THE COURT: Well, I just wanted to, you know, getting beyond the standard a little bit and looking at what the allegations are here in light of what you just said, that the government needs to be able to show that if the allegations were proven, it would constitute a crime.

And let me just take paragraph 16 of the indictment in the first sentence. Again, I want to stress these are allegations. "Following lunch, Sittenfeld agreed to 'deliver votes' for the project in return for $20,000."

I mean, don't even go beyond that. I mean, we can talk about whether "deliver votes" is an official act or official action. Maybe that's where you're going to go on this.

But putting aside that question for now, would you agree that that's enough to show the explicit quid pro quo, and so the only question is whether, quote, deliver votes is an official act?

MR. DREEBEN: Well, I wouldn't in this indictment, Your Honor. I understand the thrust of the question. And the government, in that sense, has alleged that -- leaving aside the official act question -- would constitute a quid pro quo.

But the government agrees, I believe, that the indictment has to be read as a whole, not in isolated statements that either are undermined or contradicted by other things that the indictment alleges.

And here, our take on that paragraph is it has to be read in the context of, A, the legal standard; and B, the prior allegations.

The legal standard here is that, as the Supreme Court said in *McCormick* and as the Sixth Circuit said in *Terry*, the public official has to agree that his actions will be controlled by the payment. And if you look at that sentence in isolation, that's what the government is trying to do.

If you look at the prior paragraphs of the indictment, going back to paragraph 14, paragraph 15, what you see is that

Mr. Sittenfeld has already declared his support for development projects, particularly in the urban core.

He has voiced that without any (audio distortion) the government claims that there's any connection made to possible campaign contributions. In fact, when the confidential witness proposed a transaction that the government has characterized as a quid pro quo, Mr. Sittenfeld, by his own terms, pushed back on it and said, No, there can't be anything like that. What I can tell you is what my positions and policies are.

So our view --

THE COURT: But Mr. Dreeben, I mean, so let's drill down on that a little bit. I mean, part of this seems like a levels of generality issue. I start with paragraph 16, you go back to 15 and 14.

But then one can go further back. And if you go to the 30,000-foot level, we've got a project that apparently was permanently stalled, notwithstanding Mr. Sittenfeld's alleged, you know, desire to always be supportive of such projects. Whatever. It was stalled. And then a series of contributions were made and, suddenly, it was un-stalled, right? I mean, that's what's alleged. And again, I'm not saying that's true facts, but that's what's alleged in the indictment from the 30,000-foot level.

You've got a project that's not going anywhere. Campaign

contributions are made. Things are said. And then, all of a sudden, the project starts moving. That's also alleged, right?

MR. DREEBEN: Your Honor, I don't actually read the indictment quite that way. I mean, the first -- these setup charges unfold in two stages.

In the first stage, and I'll refer to it as stage one, and that's where the government pins its case on the "deliver the votes" language in paragraph 16 we've been talking about. That was delivering the votes on a development agreement, but that development agreement does not happen.

What happens in the -- according to the indictment in the second phase is the property is transferred to the Port. And then there's a separate set of events that are going on with potentially having the Port -- which I believe, and I think this is in the indictment -- (distorted audio) the property for a dollar, with moving -- trying to move towards a development agreement. The indictment doesn't allege that that happened either.

I don't think that the indictment is -- and to be candid, Your Honor, it doesn't have to allege that Mr. Sittenfeld succeeded in delivering the votes. That's not the legal standard. We're not claiming that it is. But I don't think that the indictment, fairly read, says that the money came along and that's what unstuck it.

I think what the indictment does, barely, is demonstrate a firm commitment by a political figure to pro-development policies and a willingness to engage on behalf of constituents in support of those policies. He's doing this for independent reasons. He's doing this, even according to the indictment, because it's in his consistent political program as a council member of Cincinnati.

And our fundamental submission on this part of the case is that when a political figure has independently committed himself to that view, the government cannot, without more than there is in this indictment, claim that the political figure's actions are controlled by or that he has agreed that they won't be controlled by political contributions.

The one consistent through line through this indictment is that Mr. Sittenfeld favors urban development. He does that before there's money on the table, he does it during the conversations in which the money is offered by the undercovers, and he does it at the end.

Added to that --

THE COURT: But Mr. Dreeben, I mean, so in paragraph 9, it says the CW had been trying to get a development agreement since 2017 with no success.

MR. DREEBEN: Correct.

THE COURT: He wants a development agreement. And then, according to the indictment, at the meeting after which

campaign contributions are discussed, Sittenfeld agreed to deliver votes to get that deal, which is a development agreement, responded by -- I'm reading from 16. "Responded by promising UCE-1 that he would deliver city council votes to support a development agreement for CW to develop Project 1."

So the very development agreement that the indictment alleges they couldn't get, notwithstanding Mr. Sittenfeld allegedly being pro-business presumably in 2017, all of a sudden, after campaign contributions, the indictment alleges he's going to, quote, deliver the votes to get that very development agreement. So I'm struggling a little here.

MR. DREEBEN: Well, he said that before, Your Honor. I mean, if you look at paragraph 15, the third sentence indicates that he would shepherd the votes for the project.

I mean, the point here is that even this indictment does not deny; it proves that the defendant is pro-development, pro this project. There's a significant sequence of events that occurs, I think, before and during the set of dates in question that culminate in the paragraph that we've been talking about, and that is Mr. Sittenfeld wants campaign contributions, and there's a change in the local law that will affect how LLCs can contribute. He wants to get those contributions.

I don't think the government would dispute that there's nothing unlawful about doing that, and there is nothing

unlawful about soliciting funds in a conversation in which you're talking about the policies being favored.

There really could not be any other way in our system of procurement. I think this is the framing point that we want the Court to think about because political figures need to solicit funds in order to run in elections and, to be successful, are inevitably going to talk about their programs and policies, and they're going to solicit funds from those who will benefit from them and who favor them. It would be a strange --

THE COURT: Mr. Dreeben, isn't there a difference between saying, "I'm pro-business, and I'm pro-development, and I've always voted for development" and "I can deliver the votes for a development agreement on Project 1"? That seems to be two very different types of statements to me.

MR. DREEBEN: Well, they go together in the sense that in order to be pro-development, there's a necessity that some action be taken to accomplish that.

And I wouldn't -- I'm not going to disagree with Your Honor's distinction between the two, but I think that the first is a higher level pro-business approach, and the second is a more specific project orientation, but there's nothing wrong with that.

I don't think the government is claiming that paragraph 15 or even paragraph 14 constitutes a criminal

offense. I think Your Honor zeroed in on the paragraph that gives the government its strongest legs. But what undercuts the position that the government is taking is that the legal standard is that he has to agree that his actions will be controlled by the money.

And I think the undercover agent was trying to do that, obviously, in the scripted language. But what you have for the defendant in this case is remaining consistent to the position that he's articulated before the allegedly corrupt offer came along.

And when you have, on the face of the indictment, a political figure who has committed himself through a course of action, and then you have a statement by the undercover agent that tries to link the contributions to that action, and what the political figure does is not to embrace that linkage but just to return to the two things that he's legally, legitimately entitled to do. Number one, talk about his pro-development policies, which are appealing to the undercover agent and the witness for sure, and also then talk about political support for him.

And I think it is correct that we should be talking about the specific allegations in the indictment. And I don't want to go in a direction that Your Honor doesn't want to go, but to draw back to the legal standard here, I think it's important because *McCormick* recognized that if political

figures who are engaged in the inevitable activity in our democratic system of soliciting funds while talking about what they have done or what they plan to do were criminal, they would have asked for a language far more clear from Congress.

I think, actually, they probably would have concluded that criminalizing those two activities together would be a First Amendment violation because there is simply no other way for candidates to run. Historically, the Court recognized that's what they do.

And turning to the reasonableness as to the honest services and Hobbs Act charges, and this is consistent with longstanding jury instructions that the government has supported, including in its brief in the *McDonnell* case, that the mere simultaneity or the temporal coincidence of solicitation and explanation of policies cannot be a crime.

So *McCormick* then went on to say it needs to be shown that there's a payment that controls the actions of the politician. He needs to manifest that his intent is to be controlled by the payments that he's getting. Otherwise, what you have is people who are running on their platforms and seeking political contributions in order to do it.

So with that --

THE COURT: Well, but when you say, you know, evidence of control or an allegation relating to control, I assume you just mean conduct that's consistent with the notion

that the person is being controlled by the campaign contributions, right?

MR. DREEBEN: Well, I think I would go farther than consistent. We are not arguing, as the government suggested, that there needs to be an express agreement. That would be enough. I think we all agree on that. And I think there isn't anything in this indictment that would reflect an express agreement by Mr. Sittenfeld to the terms of the undercover agents.

The government may contend that. That's one of the paragraphs in the indictment. But I think they are relying far more heavily on the instruction from *Evans* and language that winks and nods are no way of evading the law. Of course, we don't think that winks and nods are a way of avoiding the law.

But what we do think is that when you have factual allegations on the government's own terms establish the political things -- his pro-development posture, his statement early on in the indictment that he would shepherd the votes -- there's a causation problem if what the government says is, Well, then we offered money, and he agreed to do it.

THE COURT: Even the first shepherding of the votes comment was after a discussion of money, right? I mean --

MR. DREEBEN: But there's nothing illegal about that, and I think that that's really our starting point. And if the

government disagrees with this, I would be a little bit surprised because *McCormick* goes in the opposite direction. There needs to --

THE COURT: But you would agree, wouldn't you, Mr. Dreeben, that the mere fact that a politician does something that the politician would have done anyway, if they do it in exchange for money, that that can be -- in other words, they don't have to change their --

MR. DREEBEN: Yes.

THE COURT: -- position, right? You'd agree with that?

MR. DREEBEN: Yes. Of course. They don't have to change their position, but there does need to be a factual showing or, in this case, an allegation that would overcome the causal problem that exists when a politician says, This is what I'm gonna do, and then there's money offered.

This isn't coming from Mr. Sittenfeld, even according to the indictment. This is coming from the undercover agent, who is trying to draw a link between the money and the vote, and that comes on the heels of allegations that make it clear he's already prepared to shepherd the votes. And there's no explicit linkage between shepherding the votes and the campaign contributions that exist in those paragraphs.

There's an earlier paragraph in which Mr. Sittenfeld makes clear, Of course there can't be any quid pro quo, and I

know that that's not what you're saying either. Here's what I think I can tell somebody. I have been pro-development for the seven years that I've been on the council, and I am a good political investment because I enjoy support, I have polling numbers, I'm likely to be the next mayor.

I think saying that those kinds of things could form the basis for a criminal charge would be very threatening to the way political figures interact with contributors.

THE COURT: I agree. But what if the statement is, "Well, yeah. If you contribute to me, I can get Project 1 through the city council"?

MR. DREEBEN: That would be a much more damning allegation than any that the government alleged in this indictment.

THE COURT: You would agree that would be a problem, "If you give me money, I can get Project 1 through city council"?

MR. DREEBEN: Yes. I think that that would be difficult, but I think that that is -- that would be expressed, and that's not what we have here because Mr. Sittenfeld is not drawing that link. At no point is he drawing the link between campaign contributions and the policies that he's well established.

And we can look at other portions in the indictment too. After this Project 1 doesn't succeed, really there is no

approved development agreement, things are still stalled, and there's a series of allegations that the government, I don't even think, really is trying to link up to a criminal offense.

Paragraphs 24, 25, 26, et cetera, where Mr. Sittenfeld continues to be supportive of the project. He thinks it's good for Cincinnati, and he's voicing the fact that he's been pivotal to this, as you would expect a political figure to do for actions that he believes will be beneficial for the city and his constituents.

There is no allegation of soliciting campaign contributions or offering campaign contributions during that sequence. So what you have is before the attempted linkage by the undercover agent of campaign contributions and action, Mr. Sittenfeld declares he's for it, and he can shepherd the votes.

After it, when it doesn't really go through, he's still on board with this project, beyond the terms of the indictment itself. And it's not until --

THE COURT: But in paragraph 28, the government says the reason for that is the money, right? Because "In September and October 2019, Sittenfeld received additional payments from the UCEs, knowing and believing the payments were made in connection with Project 1 and in return for specific official action relating to obtaining a development agreement from the Port" now, because it's been transferred to

the Port, "for Project 1 and for advancing legislation and other potential official action to further Project 1." So --

MR. DREEBEN: Yes.

THE COURT: -- agree with you that he's continuing to be supportive, but they also say, We're alleging that it's because he's receiving payments.

MR. DREEBEN: Well, I think this is the difference between the general allegations in the indictment, and the government unquestionably knows how to allege conduct that it believes is criminal, and then the facts that they provide to back it up.

And when the facts that they provide to back it up undercut it, then I think it's like *Landham*, where the government alleged the elements of a threat and said that there was a threat of bodily harm, but it provides the context that supports this allegation, and it undercuts it rather than confirms it.

THE COURT: Yeah, but my concern is in *Landham*, those statements legally -- it was legally impossible for those statements to be threats because they were directed at backward action.

I look at the alleged statements here and some of the other allegations, like paragraph 35, that "Over the next several months ... Sittenfeld indicated that he continued to apply pressure and promised to apply additional pressure."

I mean, it isn't legally impossible that that's a crime. It may not be, in and of itself, enough yet. There may need to be more that's shown. But unlike *Landham*, it doesn't seem to be legally impossible.

MR. DREEBEN: I think *Landham* was different in the way in which it was legally impossible. Here the legal impossibility is that absent the explicit connection, the charge fails. And the government, I don't think, can cherry-pick the allegations that summarize what its theory of the case is and then provide specific facts that undercut it.

THE COURT: They didn't even have to do that, right? They could have just listed the elements in the statute and said in between 2017 and 2019, Sittenfeld did all those things.

MR. DREEBEN: But I think it would be a different indictment had they done that, and we may have then moved to say that under *Hamling* and other Supreme Court cases, this is an instance in which further context needs to be pleaded in order to sustain the indictment because of the First Amendment implications and --

THE COURT: You cited *Huet* from the Third Circuit --

MR. DREEBEN: Correct.

THE COURT: -- and *Huet* said, quote, Generally, an indictment will satisfy these requirements where it informs the defendant of the statute he is charged with violating,

lists the elements of the violation under the statute, and specifies the time period during which the violations occurred.

MR. DREEBEN: Yes.

THE COURT: So I suppose you might say it's a little different here because it involves speech, and we have First Amendment concerns lurking in the background and all that. I mean, I guess I get that, but --

MR. DREEBEN: I would say two things, Your Honor. One is that's the bare minimal standard in a context in which you do not have to plead further context in order to establish a criminal offense.

When the government has gone further, I don't think that it can rely on just having satisfied or arguably satisfied the bare minimal notice standards. Then it becomes a responsibility of the Court to determine whether there's actually an offense alleged.

Let me give an example that may help illustrate this. Suppose the government were charging a bank robbery which would involve a forceful taking of a thing of value, and the force that's needed is sufficient force to overcome the will of the victim.

Suppose that the government brought an indictment, and it charges it in the statutory language, and then it charges facts that indicate that the bank robber used no force

whatsoever and no threat of force whatsoever. The bank robber was very polite and did nothing that constituted even implicit threat of force.

I think that the Court could look at it and say that they -- as you said earlier, although it's a civil context -- pleaded themselves out of court because they've alleged sufficient facts to constitute the crime that, in fact, do not constitute the crime.

THE COURT: But I like your hypo, so let me tweak it a little bit. So instead -- exact same case -- the indictment says, "Did things, including the following," and then lists a bunch of stuff that isn't, in and of itself, enough. But just said, "Did things, including the following."

So maybe that missing force element is not listed yet in the indictment. Obviously, it would need to be proven to a jury, but they've generally alleged that force was used because that was one of the elements of the statute. They've generally alleged this defendant violated the statute. They've generally alleged that force was used.

But the specific things they say, "include the following." And we all agree, well, those things, boy, that isn't going to cut it. But they said "include," so they haven't pled themselves out of court yet because you could prove other facts consistent with what they've said in the indictment under which there may still be a crime.

Why wouldn't that work?

MR. DREEBEN: Well, it's not this indictment, first of all. This indictment is not designed in that way. And I would have trouble with the sufficiency of an indictment in the context that we're in now if what the government provides as its foundation for an explicit quid pro quo doesn't satisfy that standard.

This is where the second aspect of whether *Hamling* states the entire theory of the case or not comes in. There are contexts in which the government needs to say more than would satisfy a bare minimal indictment.

Look, we've all seen indictments in which the government says, "On or about X date, the defendant possessed, with an intent to distribute, a controlled substance," and that's good enough.

But this is not that indictment, and I think that given the legal sensitivities surrounding criminalizing the raising of political contributions, this is a context in which it would be appropriate for a Court to demand more.

And the government has gone beyond it. It hasn't alleged an indictment in which it says, "We have a lot more to say. This is what we've said today, but there's, you know, additional facts that we would use to satisfy the explicit quid pro quo."

I think that if they have not satisfied it on this

indictment, the Court can dismiss this indictment, should dismiss this indictment, and they can supersede. If they have not satisfied the applicable legal standard with what they have charged here, but they think that they can, they can file a superseding indictment. And at that point, the Court can evaluate whether they have crossed the relevant thresholds that are necessary.

I don't think that we would be having this discussion were it not for the backdrop of, A, the sensitivity of the context here, the legal context; and B, the law that frames it, most particularly *McCormick*, with its insistence on the explicitness requirement in the First Amendment backdrop; and C, the fact that the government chose to allege a great deal of detail, including many quotations. Not the quotations from the entire calls, as Your Honor knows, but they've chosen what they think meets the applicable legal standard.

And for the Court to simply look at that and conclude -- if the Court agrees -- this is not enough doesn't knock the government out of the box. It just means that if the government has more that can cross that threshold, it should do it.

And I come back to, again, this is not an indictment where they just allege, you know, the language that's in the sharking act -- you know, the scheme count and then the Hobbs Act and program fraud count. I'm not claiming that they

didn't satisfy the elements of the offense when they alleged those counts. They couldn't. And if they had wanted to, they could have tried doing an indictment with nothing more, saying you have enough notice, you have time and place.

They did not do that, and I think they didn't do it for a reason. And the reason is that they wanted a speaking indictment in which they can set forth their view of why this conduct constitutes a crime.

Our view is that it doesn't constitute a crime under the applicable and governing legal standards. They may disagree, as the summary in the paragraphs that Your Honor has focused on suggests, but we think that there is a deeper principle here, and the deeper principle requires that the Court take a closer look and ask whether a political figure who has declared his desire to support the development project can be ensnared in the Hobbs Act, honest services, and program fraud violations on the basis of statements from an undercover agent that the political figure doesn't embrace or reject.

He continues doing what he has done all the way along. He's pursuing two things. He's pursuing a project that he has declared as beneficial, and he is accepting and soliciting campaign and political contributions because that's what you need to do to be a successful politician.

And our fundamental --

THE COURT: I've been keeping you talking a long

time, and I apologize. These are all very interesting issues, and I do want to get to your colleague from the United States Attorney's Office here pretty soon.

I had a couple of additional questions. And specifically, you know, you've made an argument that the things that are alleged are not -- other than the vote, other than his own vote, are not official acts.

MR. DREEBEN: Correct.

THE COURT: I'd like to give you an opportunity to address a couple of concerns the Court has in that realm on that issue.

In particular, as I read *McDonnell*, it suggests that agreeing to pressure other officials or advise other officials with the intent that those officials undertake an official act is or can be an official act for purposes of satisfying that requirement.

And I guess when I see "deliver the votes" or some of the other things, sometimes they actually use the pressuring and advising language. As I understand the argument, it would be something along the lines that, well, other council members can undertake an official act in the form of a vote. So if you pressure or advise them with regard to how they should vote, that falls within the *McDonnell* official act language under the pressuring and advising parts. And I just wanted to hear your response to that, if I could.

MR. DREEBEN: So, Your Honor, I think you correctly and accurately summarized *McDonnell*. This is another area in which I think the indictment has to be looked at closely, both in its general language and in the specific facts that it uses to try to back it up.

Our view on the legislative context is that the activities fall into a different zone than an executive official or a legislative official doing a cross-branch advice or advice within the executive branch.

The Court needs to take into account that the nature of a deliberative body, such as the council, is that people talk to each other with a view towards persuasion, which is different, I think, from advising, knowing that it will form the basis for official action, or pressuring somebody else.

And I would locate what's at issue in the legislative context in the spectrum that *McDonnell* laid out. *McDonnell* has the language that Your Honor has talked about and that the indictment uses in two different contexts. One, the honest services charges; and second, in paragraph 35 Your Honor already pointed to.

McDonnell said that hosting a meeting, having an event are not official acts. And it went a little bit further than that too. It said talking to other officials and expressing support also are not official acts, unless it crossed the line into the "pressure or advised" text.

And our submission is that in the context of legislative deliberations, what's been alleged here even as "delivering the votes" doesn't cross beyond talking to or supporting particular projects and be transformed into the kind of official act that *McDonnell* had in mind as potential --

THE COURT: What phrasing would you use to describe that line between permissible persuasive conversation or discussion on the one hand and impermissible pressuring and advising on the other? How would you have the Court formulate that standard?

MR. DREEBEN: I would say that it has to go beyond the ordinary deliberations that are characteristic of a multimember legislative body. And that does not include talk, and it does not include conversation, which are two things that the indictment actually alleges.

At one point, it says that Mr. Sittenfeld will talk to Public Official A. In another part of the indictment, it says that he's already engaged in those, quote, conversations. So I think --

THE COURT: So under your view, then, a city council member could tell someone in Cincinnati, "If you pay me $5,000, I will try to lobby my colleagues to vote in your favor on this project," and that would not be criminal because that's not an official act?

MR. DREEBEN: Your Honor has posed a hard

hypothetical. I think that that does go beyond what's in this indictment because of the --

THE COURT: But that wasn't my question. I was using your rule in trying to explore --

MR. DREEBEN: Yes.

THE COURT: -- and that's why I called it a hypothetical. But your rule leads ineluctably to that conclusion.

MR. DREEBEN: I don't know that it does lead ineluctably to that conclusion. I think that it turns on the specifics of what's actually alleged. And I think that in this context, it falls short of going beyond the ordinary process of deliberation and conversation you'd expect in a legislative body, as compared to the sort of pressuring that the *McDonnell* Court had in mind. The *McDonnell* --

THE COURT: But doesn't "deliver the vote" sort of invoke that sort of going beyond -- you know, it's a sort of a promise. "I'll get those."

At least as alleged -- and again, this is all allegations. At least as alleged, it feels sort of like, "Yeah, I'll go get those. I'll do what it takes and get the votes I need on this project."

MR. DREEBEN: I think it reflects a politician's confidence in his persuasive ability and no more. And the specifics are totally missing here. There's no allegation

that he said, "I'm going to go talk to X, I'm going to go talk to Y." There's no allegation that he actually said or did anything.

I recognize that the law doesn't require that. An agreement is sufficient. But if you're trying to determine what the content of the agreement is, it can help to look at what actually happened. And here, the government doesn't have anything like that to help take this over the line.

There's one other place that I thought is relevant to your hypothetical, which is the paragraph that you've already pointed to, paragraph 35, which is the first time in the indictment that the government uses the "pressure" language. Doesn't actually use the "advise" language in the earlier part of the indictment involving deliver the votes, and I will acknowledge that they don't have to use this precise language in order to charge him.

But the first time they use "pressure" is in paragraph 35, and this is very nebulous. This says he continued to apply pressure and promised to apply additional pressure to public officials, quote, relating to a development agreement for Project 1.

What I would focus on here as inadequate is what is the meaning of pressure "relating to a development agreement for Project 1"? The development agreement is not spelled out. "Relating to" is an incredibly broad connection. It doesn't

indicate that there's any official conduct that's involved there.

As Your Honor will recall, there are two parts of *McDonnell*. One, you need a specific, focused, concrete question. And the second is you need official action on it.

Even if the Court is prepared to say that you alleged pressure, you know, you've got the action on it, there's nothing specific here that falls into the "concrete, focused" basket that *McDonnell* requires --

THE COURT: But isn't it the development agreement? Why isn't the development agreement on Project 1 the concrete project?

MR. DREEBEN: The development agreement is a potentially vast set of governmental actions that are not specified here. But what I'm focusing on is that it says "relating to."

I don't know what "relating to" means. I think if Your Honor does not dismiss this allegation, it may be appropriate for the government either to tell us what it means or for the Court to grant a bill of particulars because, at this point, we have no idea what it thinks Mr. Sittenfeld did, and we have no idea what it thinks it related to, and that --

THE COURT: That was, I guess -- well, now, I still have two questions left. There will always be two questions left.

But that was sort of where I was going is a lot of your complaints seem to be the kind of complaints that could be made with regard to an awful lot of indictments, like the one for distribution that we talked about a little bit earlier. And isn't the typical remedy for that a bill of particulars rather than, you know, dismissal of an indictment?

MR. DREEBEN: I think this is actually one of the few paragraphs where I would say that we need some more precision to have any idea what the government is talking about and in order to meet the charges.

So we're not here making that motion today. The motion that we're making is actually based on all the details that the government has chosen to lay out in the indictment, which we think falls short of the criminal offense.

THE COURT: And my last question, Mr. Dreeben, for right now, at least, is with regard to the separate allegations directed under 666(a)(1)(B).

MR. DREEBEN: Yes.

THE COURT: As I read *Porter*, a quid pro quo requirement is -- there is no quid pro quo requirement for 666(a)(1)(B), so what does it matter whether they've sufficiently alleged an explicit agreement or not? You would agree, I would think, that that isn't a requirement for a 666(a)(1)(B) charge?

MR. DREEBEN: I actually would agree with the First

Circuit and language in the Second Circuit's opinion that is otherwise. But I recognize that in *Abbey*, the Sixth Circuit confronted this question and resolved it, I think, incorrectly and the court followed that in *Porter*.

We have a different argument on Section 666. We're not arguing for the identical quid pro quo requirement, but we do think that there's language in 666 and the same policy concerns that animated *McCormick* that do justify requiring an objective screen before the Court allows a 666 charge to go to the jury. This is purely a subjective intent requirement.

So 666 has to have two intent requirements. One is "corruptly," the other is "intending to be influenced." I will leave aside the fact that the Supreme Court derived a quid pro quo requirement from "intending to be influenced" in the *Sun-Diamond* case in interpreting 18 U.S.C. 201.

But there is still also an actus reus element to Section 666, which is there has to be a corrupt solicitation, corrupt demand, or corrupt acceptance or corrupt agreement to accept.

And our view is that taking into account the considerations that inform the Supreme Court's decision in *McDonnell*, there needs to be an objective basis for inferring the corrupt conduct; that the government cannot simply go forward and peer into somebody's mind and rely on an entirely subjective approach to Section 666 without risking

criminalizing the very conduct that *McCormick* said is protected.

So I would say that if the government could come forward and say, Hey, in the same conversation, you know, Mr. Sittenfeld touted his support for the following project, and he asked for money, you can infer from that that he intended to be influenced and he acted corruptly, then I think that the same problem that the Court tried to avoid in *McCormick*, and that the Sixth Circuit did recognize in *Abbey* in connection with the Hobbs Act, not 666, would exist.

Abbey was not a political contributions case. *Porter* was not a political contributions case. Why hasn't the Sixth Circuit ever confronted this precise problem. But it has said that the meaning of "corruptly" in criminal law -- this is in footnote 7 in *Abbey* -- "is an act done with an intent to give some advantage inconsistent with official duty and the rights of others."

That is classically the language from which courts derive a form of a quid pro quo requirement in the bribery context. So it means just bribery.

This is a quote from a Justice Scalia opinion, a dissenting opinion, the *Aguilar* case, and it goes on to say bribery that is more comprehensive because an act may be corruptly done, though the advantage to be derived is offered to another.

So our submission to the Court on this one is that 666 doesn't have an exclusive quid pro quo requirement as a form of conduct that the government needs to allege and prove. But it does require, with a gloss based on the *McCormick* policies, that there be an objective foundation from which a jury could infer corrupt action with an intent to be influenced.

And absent that, the statute is either unconstitutionally vague or infringes upon First Amendment rights. And in order to --

THE COURT: In that regard -- and then I promise this is my last question so, Mr. Singer, please be ready to go.

But in that regard, wouldn't structuring the way in which contributions are made, you know, using LLCs or using people who are divorced from the people who are actually seeking the benefit, wouldn't that give rise to some kind of inference of sort of known wrongdoing, or at least potentially give rise to that kind of inference?

And I understand jury closings are great things, and we can do a lot in a jury closing, but we're at the motion to dismiss an indictment stage. And so to me, it's just could you, you know, possibly infer from that some kind of corrupt conduct. And it seems like that might give you at least a leg in that direction, doesn't it?

MR. DREEBEN: I think that in some cases, surreptitious activity, concealment, deception is the kind of

thing that the government would point to to draw those inferences.

What's different about this case is that the desire for anonymity and protection came from the confidential informant, who said right up front, I don't want my name associated with these things because Public Official A is on my case.

And so when you have a political figure who is doing legitimate activity -- there's no claim that the PAC is unlawful. There's no claim that the contributions were unlawful. In fact, scattered throughout this indictment are several instances in which the defendant comes back and says, I'm not really sure we can do this, you know. We need names for these LLCs. They have to be real names, real LLCs. And the confidential witness and the undercover agents, who the government is scripting, are the ones that say, I don't want my name associated with this.

So I think that that removes some of the force of the government's contention here that there was surreptitious behavior that supports an adverse incurrence on the intent of the defendant.

In this sense, I think the government has been reasonably candid. There's much more context in these telephone calls. Not the purpose of this motion to address, but it's put enough in this indictment to actually undercut some of the inferences that the law would otherwise allow to be drawn and, in another

case, are legitimate inferences to be drawn.

So that's our submission on Section 666. We recognize it's a different statute. It hasn't been construed in this context, but we think that it would be illogical not to apply the protections that *McCormick* thought were intrinsic to the political system in the context of political contributions.

And other courts have recognized that. There actually have been cases in which the government has conceded that a quid pro quo has to be pleaded under Section 666 in the political contribution context. The Eleventh Circuit recognized that the government had done that in the *Siegelman* case and in some other cases, and the Sixth Circuit just hasn't confronted the issue.

THE COURT: Thank you, Mr. Dreeben. I will give you an opportunity to say a few words in response to your colleague. But I think, in the interest of time, we should probably hear from the government at this point.

MR. DREEBEN: Thank you, Your Honor.

THE COURT: Thank you.

Mr. Singer, is it you we're going to hear from?

MR. SINGER: Yes, Your Honor.

THE COURT: Good afternoon, Mr. Singer.

MR. SINGER: Good afternoon.

THE COURT: So we've talked quite a while already with Mr. Dreeben. Reactions? Let's start with your view on

what the standard is.

I mean, it sounds to me like what the real motion here is you guys could have had a lot skinnier indictment, and it may have been subject to a bill of particulars, but it wouldn't be subject to this motion. But now you sort of, you know, shot yourself in the foot, and you alleged a bunch of facts that show that a crime didn't occur and that you've sort of pled yourself out of court.

So what are your thoughts on, A, what's the standard; do you think? What standard should I use to review the Complaint?

MR. SINGER: So the government would submit that the standard is, quite simply, what is set forth in *Hamling*, repeated in *Lee*, that where the elements provide notice and where the facts give the defendant the opportunity to plead double jeopardy, that's all that is required at this stage.

The fact that additional facts were put in, additional notice was provided does not all of a sudden transform it into a situation where the government has to provide all of its evidence, that it has to present its entire case in its indictment because it simply provided additional notice.

There is no legal support for that that has been cited in the defendant's brief. And it's particularly telling, I think, that none of the cases that the defendant cites to support dismissal based on -- in other cases, like *Landham*,

where the Court dismissed after analysis of the language and of the facts, none of them are in the political corruption context. None of them are in a situation where whether or not a quid pro quo was adequately alleged is subject to dismissal based on additional facts.

And the reason for that is because a quid pro quo is, in itself, a fact-based analysis. A fact-based analysis that turns on all the facts and surrounding circumstances, and it is one that the jury must determine.

It's unlike, for example, *Landham*, where the Court -- or where the indictment alleged a threat, and then said "to wit," and then set forth the language of that threat. And the Court was able to assess that that language that they to witted was enough to show that there was no threat.

THE COURT: Well, but as I understand Mr. Dreeben, he's saying -- kind of accepting that for present purposes, at least, but saying, okay, well, in paragraph 16, you say Sittenfeld agreed to deliver votes for the project in return for $20,000, and then you go on for another four sentences, and all those things show that he wasn't really promising to do anything in return for the $20,000. He was just saying these are things that I will do, I guess, but not -- I think the question is what gives rise to the "in exchange for" part of that?

MR. SINGER: What gives rise, Your Honor, is that the

jury's task, in assessing whether or not it was a quid pro quo, is to consider all of the facts and circumstances to determine whether it existed. And so to pull out a particular paragraph and to create an inference based on that paragraph in the exclusion of not only all the other paragraphs in the indictment, but which the way it would be presented at a trial, the entire recording, all of the circumstances surrounding the recording and the recordings before and after that that gives that context, that gives the circumstances the jury must consider in assessing it.

THE COURT: So in your view, with regard to a claim or a case like this one, having set forth the statutory elements, are there any facts that the government could have put in here that would have put it in the *Landham* type situation, where it kind of pled itself out of court?

So as long as they say, "Sittenfeld agreed to deliver votes for the project in return for $20,000," no matter what they go on to say about what that actually means, about what he actually did or anything else isn't going to boot them out of court?

MR. SINGER: So long as there are facts in there that support the elements that are laid out and the allegations in the indictment factually support those elements, then no. I think --

THE COURT: Well, but that's the question. Does it

factually -- what's your factual support for the statement "Sittenfeld agreed to deliver votes for the project in return for $20,000"? What facts support this?

I think what Mr. Dreeben is saying is you read the rest of the facts in that paragraph, it doesn't support that. I mean, you can say, "I disagree. I think it does," but ...

MR. SINGER: Well, I disagree. I think it does. But I think that what the point is, that the jury is going to have to hear that recording and make that determination. And it's not based on the cold words on a paper. This is a paraphrase and a summary of what are recordings of the actual evidence that the jury would hear. That's the evidence of the case and that -- we have set forth --

THE COURT: In that regard, why didn't you just stop paragraph 16 after the first sentence? What's the role of the rest of that paragraph?

MR. SINGER: The role of the rest of the paragraph is to give context to the first sentence.

THE COURT: Okay. So that is the stuff that is supposed to buttress the fact that he's agreeing to deliver votes in return for $20,000. That's your summary of the facts that sort of buttress that; is that right?

MR. SINGER: That's correct.

THE COURT: And so if I look at it and say it doesn't buttress that, should you lose at that point or not?

MR. SINGER: No, because it's the jury's job to assess that. This indictment puts the defendant on notice that these are the types of facts that support the allegations. They're not all the facts.

THE COURT: You're saying the question of whether some act is being done in return for money is just a topic that the Court cannot address at the motion to dismiss an indictment stage -- is that what I understand you to be saying? -- because that's inherently a jury question that can't be resolved by the Court at the motion to dismiss stage?

MR. SINGER: That's correct, Your Honor. The language in evidence sets forth what an explicit quid pro quo requires, and that is a payment of money in return for some specific official action. That is what the government has alleged.

The facts that are introductory and the additional paragraphs in the beginning set forth the notice, putting the defendant on notice that these are the types of facts that are going to support these allegations. They are not all the facts, though, but they do support the allegations. And in order to assess whether or not that's true, it is up to the jury to analyze all these based on all the facts.

I would also -- I would disagree, as I think you noted, as to whether or not the remainder of that paragraph doesn't support its topic sentence. What we have here is -- well, I

think it's worth backing up because, again, this paragraph is not read in isolation. It's read in the context of the paragraph that preceded it.

And although inducement is not required under the *Evans* standard, as *Evans* set forth, merely accepting a bribe, knowing that it's being paid for some official action, is sufficient in itself. The allegations in the indictment lay out quite clearly inducement from the start; namely, paragraph 13, in which, I think as the Court noted, the allegations suggest that the defendant knew that the cooperating witness was having a hard time getting a development project to go through.

Knowing that, while soliciting money and in the same conversation as soliciting money, he says, you know, "You don't want me to be like, 'Hey, Cooperating Witness, like, love you, but can't,' you know ... I want people to support me." Well, a smart candidate does that.

This allegation shows that the cooperating witness is put in a situation where he doesn't want this individual who is going to vote on his project to say, "love you, but can't." He feels like he needs to give money.

The conversation that followed a couple days later, a very express quid pro quo was put out there. We'll give you $10,000, but we need to know it's "a yes vote ... without a doubt."

THE COURT: Which paragraph are you reading from, Mr. Singer?

MR. SINGER: That's paragraph 14. This is the paragraph in which the defendant claims that the exculpatory response was that nothing could be a quid pro quo.

THE COURT: Right.

MR. SINGER: Again, this goes into all the facts and circumstances that a jury must consider.

His response, It can't be a quid pro quo, but let me meet you in person so I can show that I'm pro-development and that you are investing in a winning endeavor.

So the jury could consider this in a lot of different ways. They could say, oh, he doesn't want a quid pro quo. The jury could also say he just was offered a very express illegal offer, and he still wants to go meet that person and show that he's worthwhile and show that he is going to be able to present a winning opportunity for this corrupt investor. And then not only that --

THE COURT: I think what Mr. Dreeben would say is, yeah, that's all well and good. But sort of, you know, in politics, the way that people get elected is by finding other people who share the same goals as the person running for office.

So if it's a pro-development person who is running for office, that person's going to try to find people who would

benefit from development in Cincinnati or are interested in developing in Cincinnati. And they're going to go and tell those people, I want you to know that I'm a very pro-development person. And if I get elected, you can expect there's going to be a lot of support for development.

And then those people who are pro-development give money, and then the U.S. Attorney's Office comes in and says, well, that's bribery, or that's honest services doctrine, or whatever, you know.

It does seem like some lines need to be drawn, doesn't it?

MR. SINGER: So if the case were charged based on those two paragraphs I just recited, then there would be issues. But the point is that these paragraphs are indicative of intent, that they are part of all the facts and circumstances that a jury must consider.

And so when the defendant meets with this individual a week later, he knows he's a corrupt investor. He knows the guy is dirty. That is part of the surrounding circumstances that must be considered.

And so when that corrupt investor talks about what he wants from a development project, and in the same conversation they talk about campaign contributions, that's further evidence of intent. That's further evidence that they are moving towards an agreement that could be corrupt.

And then when the defendant -- when the corrupt -- that same corrupt investor says, "I'd like a deal. We'll give you $20,000, but we need to know that this project is going to be veto-proof. That means we're going to need six votes on this project. How can I get you that money so we can get that deal," the jury could reasonably conclude, based on that, when the response is, "I can deliver the votes," and then they talk about how to get that $20,000 to the defendant, that when he receives that, when he agrees to that, he's doing it knowing that he's receiving a bribe.

And that is the fundamental link that I think the defendant is missing. They don't -- they have latched on to this language that requires control, that they need to be controlled by the agreement.

But I think what the law says, as set forth in *Evans* and *Blandford* and *Terry*, is that by knowingly receiving what is a bribe, they are agreeing to be controlled by that.

Evans said, "We hold today that the government" --

THE COURT: Well --

(Indiscernible crosstalk.)

MR. SINGER: -- "that a public official has obtained a payment to which he's not entitled, knowing the payment was made in return for official acts."

At the time --

THE COURT: What do you say to the argument that,

well, the phrase "deliver votes" is not an official act? I mean, you would concede you need an official act, right?

MR. SINGER: Absolutely.

THE COURT: Okay. And in your view, is "deliver votes" an official act under *McDonnell*?

MR. SINGER: It is, Your Honor. It is a specific question or matter. We're talking about Project 1 --

THE COURT: Okay.

MR. SINGER: -- focused. We're talking about a development agreement, and it is an action on that specific matter. It is not only the vote from the defendant, but it's his agreement that there will be other votes that will accompany it; specifically, five other votes.

THE COURT: How are the votes that other city council members cast an official act of this defendant?

MR. SINGER: So it will be -- again, this is a jury question, but it will be up to the jury to determine what did he mean by "deliver votes" based on the context, based on the nature of the conversation.

THE COURT: Well, I don't know. You might have thought it would have been a jury question in *McDonnell*, but it turned out not to be, right? I mean --

MR. SINGER: Well, I don't think that's true, Your Honor. What the Court said in *McDonnell* is that the jury instructions that were provided on official action were

incorrect because they were too broad. It was remanded to determine whether or not the facts that were set forth were sufficient.

I think what *McDonnell* said is it's up to the jury, under the facts of the case, to determine whether the public official agreed to perform an official act at the time of the alleged quid pro quo. It's going to be up to the jury to --

THE COURT: Hold on a second. Do you think, once *McDonnell* sort of further explicated what's required for an official act, that in any way changed what's required to be alleged in an indictment, or not?

MR. SINGER: I don't, Your Honor. The Sixth Circuit's pattern jury instructions, they set forth the standard in *McDonnell*. It will be presented to the jury to determine whether or not there was a question or matter, whether or not it was specific in focus, and whether or not the defendant took an action on a specific matter.

THE COURT: But what if your indictment had said, you know, "The government alleges that the official act was that the defendant agreed to call the governor of the State of Ohio and wish him a happy birthday," which, you know, it's got nothing -- I mean, couldn't you plead yourself out of court on the official act part?

MR. SINGER: I suppose you could, Your Honor. There is some tension there with that -- the legal impossibility

type case that you were discussing previously with Mr. Dreeben. That's not where we are here.

A reasonable jury could hear "I will deliver votes," knowing that delivering votes is getting the votes of five other city council members. It means that I'm going to talk to them. I'm going to -- I will convince them that this development agreement is one that needs to be supported.

But again, that is a --

THE COURT: But it would seem like Mr. Dreeben would say the first "I'm going to talk to them" is what city council members do all the time and even under *McDonnell* is not an official act, right? I mean, just talking to somebody isn't an official act.

MR. SINGER: Correct. But I don't know if the defendant could deliver votes by talking to someone. What he's saying there, or a jury can conclude what he's saying is that you will have six votes for your project.

He's saying that because he's confident that he can shepherd votes, that he can -- a jury could reasonably conclude that means that he can convince five other council members that they too should support the project, and that is done by pressuring and advising.

That is why that language -- I would submit that is why that language was included in *McDonnell*. It would be inconsistent, I think, with how the Court views -- how the

Supreme Court has viewed corruption cases broadly to allow a public official to be able to take money, as the hypothetical that the Court presented to Mr. Dreeben sets forth, to take money to go and convince their fellow legislators to support the project and that not be illegal, that not be a bribe.

THE COURT: So to take this a little bit out of order, there's a question I wanted to ask before I forget it.

Near the end with Mr. Dreeben, we talked about the fact that, you know, attempts to conceal or things like that might give rise to an inference of corrupt behavior, illegality, or surreptitiousness, or whatever you want to call it.

But Mr. Dreeben made an interesting point in response that I hadn't thought of, which is it does seem here like the -- even on the indictment, that the desire to avoid sort of the public awareness of the link was driven more by a desire on the part of the contributors to avoid potential retribution from Public Official A than it was based on a desire of the defendant to avoid public knowledge of the contributions, or at least it certainly seems like it could be read that way.

I just wondered if you had any thoughts about that.

MR. SINGER: Yeah. You know, Your Honor, it could potentially could be read that way. But it could also be read as once the corrupt businessmen, the UCEs who are posing as corrupt businessmen, offered $20,000, that it was the

defendant who came back and said, Well, how can we get 18 different LLCs to pay $20,000?

And it was the defendant who came back and said, Well, I have this PAC that no one knows about, and it's not connected to me. That will protect you guys.

So the jury could reasonably conclude that he was complicit in that, and he was very much --

THE COURT: Well, there's nothing wrong with him being complicit in trying to protect or shelter contributors to his campaign from retribution from another public official, is there? That's not untoward conduct.

MR. SINGER: I thought that the Court's question related to whether or not that supports an inference of intent, and I think it does.

You're right. There is not -- in isolation, there's nothing wrong with delivering votes. In isolation, there's nothing wrong with accepting a certain contribution in a way, so long as it's consistent with how the FEC, states, or local law allows contributions to be accepted.

But when it's knowing -- when it's received, knowing that it's being paid for a bribe payment, and then the steps are taken to keep the names of the bribe payers off of public filings, then it supports an inference of intent, and it supports an inference of a quid pro quo.

THE COURT: The *Evans* standard that you keep going

back to, which is the public official accepted the money knowing why it was paid, basically, which crime or crimes does that standard apply to? Is that all of them, or what element is that going to?

MR. SINGER: So that goes to whether or not there is an explicit quid pro quo for the Hobbs Act and the Honest Services Act.

THE COURT: So that isn't a showing you need to make under the 666(a)(1)(B) violation, right?

MR. SINGER: That's correct, Your Honor.

THE COURT: So it doesn't go to whether it was corrupt?

MR. SINGER: Well, I think it would. So it is not an element in the same way that the Hobbs Act and honest services require the "in return for" type language. But under 666, you're right. It requires corrupt. And, again, that turns on the defendant's intent, and the defendant knowingly receiving a bribe payment would certainly be evidence that would support that corrupt element.

THE COURT: So as I understand part of what you're saying, Mr. Singer, you're essentially saying, We've never said this is everything we've got. We think it's enough for the indictment, but we've never said it's everything we've got. And if and when we get to trial, we understand what we have to prove to a jury, and that's when this should all be

decided, not on the motion to dismiss.

Does that sort of encapsulate your argument?

MR. SINGER: That's correct, Your Honor. In fact, if I could shine a light on one particular example in the official action context, I think it would be helpful.

So there is a discussion on the latter part of the indictment, in the factual portion, that discusses the zoning change that would help a sports betting project be developed through Project 1.

The allegations, they start on -- I'm focusing on paragraph 29 of the indictment. There's a discussion about statewide legislation, and then there's a discussion about increased barriers of entry for competitors to operate a sports book. So this is putting the defendant on notice as to the sports book issue that will be addressed later.

Now, there is a lot more context, factual context, evidence that relate to both of those. There were subsequent phone calls. There were other discussions about how the statewide legislation would play off the sports book and the zoning-type changes between undercovers and the defendant.

So by the time that they reached, on paragraph 31, the September 24, 2019 meeting, this issue had been discussed.

That's not the way the indictment reads because every piece of evidence, every conversation has not been entered into the indictment. But it's all evidence that the jury

would consider in determining whether or not there is official action with regard to the sports book.

THE COURT: To me, you've now pointed the Court at one of the sort of, in some ways, weaker or thinner parts of the indictment. I mean, what's the specific project, as that term is used in *McDonnell*, that's at issue there?

I mean, what specific thing is either before the city council or likely to come before the city council on which Sittenfeld is promising to take action?

I mean, they're discussing, you know, how zoning works, but where is the, "Oh, this piece of legislation is coming before the city council on zoning, and we need you to do A, B, or C with regard to that"? That doesn't seem to be here.

MR. SINGER: So the question or matter is Project 1. The official action that would be taken in support would be passing a zoning regulation that would limit competition so that a sports book could be in Project 1.

THE COURT: But where does he agree to -- where is anything that suggests he's agreed to pass a zoning code?

MR. SINGER: So he's discussing -- the language is in discussing the steps that could be taken in paragraph 31 to further this efforts to get the zoning code, to change the code so that they could have sports betting.

And the response, directly after him proposing a change to the zoning code is, This is exactly what I want you to do,

and we're going to take care of you because you're doing it.

So when they pay him -- when the undercovers paid the defendant the PAC payments that afternoon and later, it's with the understanding that he's receiving that money, knowing it is being paid so that that zoning code issue can be taken care of.

And the point is that although this paragraph references the zoning code and the discussion about what they want relating to a controlled environment, what the jury will have to consider is all the recordings that discuss this, all of the context.

And they also will have to consider that this isn't the first time that he's dealt with these individuals. By the time we get to September 24, 2019, there is no question that these individuals are corrupt.

And that is part of the context that the jury must consider in determining when he received those PAC contributions and was promised those PAC contributions. Directly after saying that "I think we can limit competition through a zoning code," and the undercover said, "I want you to do that" and gives him money in response, that he is knowingly receiving a bribe from this. That's what the jury could conclude.

THE COURT: Thank you, Mr. Singer. Is there anything else you wanted to add? I think you've kind of answered my

questions.

MR. SINGER: Yes.

THE COURT: Go ahead.

MR. SINGER: I would just add that -- I think we adequately set this forth in the briefing, but at its balance, what the defendant is trying to do is, through a pretrial ruling, resolve a jury issue without all the facts.

And there are no cases that the Court -- that the defendant has cited, not a single corruption case that supports that analysis. Not *Menendez*. The defendant cites the *Pawlowski* case. What the defendant did not note in citing the *Pawlowski* -- I think it was *Pawlowski* and *Allinson* were cited in the briefing, page ID 345.

This is -- first of all, this is the same case. They're charged in the same indictment. The *Pawlowski* and *Allinson* case are charged in the same indictment. It's the same case.

What the defendant has presented is a post-trial brief on these issues, and the Third Circuit and the Sixth Circuit have different analysis of whether or not a quid pro quo is required under 666.

But what's more important is what the defendant did not present is the ruling on the motion to dismiss in the *Pawlowski* and *Allinson* cases. And in both of those, the Court -- the same challenge was presented, whether or not 666 requires this explicitness standard, and the Court rejected it

and, in doing so, said, and I quote, Whether the facts alleged in the indictment satisfy the meaning of an explicit quid pro quo under *McCormick* or the definition of an official act under *McConnell* are factual determinations to be resolved after the government has presented its evidence at trial.

This is what the Court's holding was in response to a similar motion to dismiss, and that is what the government would argue is what is appropriate here.

THE COURT: So basically -- I'm just trying to figure out the minimum that you would need to be able to move forward with an indictment against a public official.

So, basically, if the parties have identified some project that may come before that official and they've discussed it, and the official said something like, "Yeah, generally, I'm on board with that," and then the person makes the contribution, everything else can be inferred? That's enough, from your viewpoint, to get all the way to a jury? You can just set that forth in an indictment, and this public official, then, his or her fate is now in the hands of a jury? Is that basically right?

MR. SINGER: I think that would be right. And I think the reason we included the *Terry* indictment as an attachment to our submission is that there's not a whole lot there. The only evidence relating to an agreement are fairly boilerplate language that set forth the elements and the

manner and means.

And what is important is that a grand jury returned this indictment. A grand jury heard the evidence, was presented the evidence. And once the grand jury returns the indictment, then, yes, it is up to the jury to determine these jury issues and resolve whether or not there was an intent to engage in an explicit quid pro quo.

THE COURT: And now that I've managed, while you were talking, to actually pull the relevant language from *McDonnell* up in front of me, I wanted to circle back on the zoning thing.

MR. SINGER: Sure.

THE COURT: Under *McDonnell*, it says there are, quote, two requirements for an official act. First, the government must identify a question, matter, cause, suit, proceeding, or controversy that may at any time be pending or may, by law, be brought before a public official.

So once the project has been transferred to the Port, which is in what you're calling, I think, phase two or stage two or whatever, now the project itself is no longer in front of the council.

But the question is, I guess, the zoning around that project. And it seems like the zoning is something that may be pending or may be brought before the public official. So zoning in connection with the project might satisfy that.

And then it says, "Second, the government must prove that the public official made a decision or took an action on that question ... or agreed to do so."

So where is the agreement to do something about zoning? And you're just saying that's inferred from where we are sort of in the course of the relationship among all these people at this time; is that right?

MR. SINGER: I am, Your Honor. They're in a meeting in which the purpose of the meeting is to talk about how we can get this sports book.

And the defendant says, Well, we can change the zoning code.

And the corrupt businessman says, Well, that's what I want you to do, and I'm going to give you money for it.

And I think what's important, *and McDonnell* says, on page 2371, an agreement to take official action "need not be explicit, and the public official need not specify the means that he will use to perform his end of the bargain." So they don't have to lay out exactly what they're going to do.

And *Terry* was the same way. At the time that the -- I think it was July of 2007 that contributions were made. The motion for summary judgement that was requested from the defendant was July 2008. Specifics need not be hammered out at the time of the agreement. It's just that there was an understanding. We're going to do the zoning, and we're going

to pay you money for it.

THE COURT: So it's your view that at the time the payments that are listed in paragraph 32 occurred, an objective person in the shoes of the person making those payments would have understood that it was in exchange for an agreement to do something about zoning?

MR. SINGER: That's right. That the --

THE COURT: A reasonable jury could conclude that?

MR. SINGER: The jury could conclude that the defendant received that money with the understanding that the official action in enacting a zoning change is what that money is being paid for, at least in part.

THE COURT: Thank you, Mr. Singer. I'm happy to give you more time. I don't have anymore specific questions for you, but I'm happy to give you more time if there's more you want to address.

MR. SINGER: Our briefing sets forth the issues. So unless the Court has any additional questions, the government rests.

THE COURT: Thank you, Mr. Singer.

Mr. Dreeben, I promised I'd give you an opportunity to give me some parting thoughts here. I would appreciate it if we could keep it somewhat brief.

We've had an opportunity -- it's been very illuminating, but an opportunity to talk at some length this afternoon but

would welcome additional thoughts, if you have any. And in particular, I'd like to ask you to respond to a couple of points that Mr. Singer made.

First, Mr. Singer suggests that sort of as a matter of, I don't know if you'd call it procedure or substance, but that the Court can never decide, at the motion to dismiss an indictment stage, whether the "in return for" element is met based on the facts set forth in the indictment.

And second, he discussed the *Evans* standard of where the public official accepts money, knowing why it was paid. Or I think another way to sort of rearrange that would be to say what an objective person in the shoes of the person making the contribution would have understood they were making that contribution for.

So I'd like your thoughts on both of those topics, at least, but I'm willing to hear other things that you might have to say as well.

MR. DREEBEN: Thank you, Your Honor. Those happen to be the first two points that I had on my list to address so we are eye to eye on that.

First of all, I'm not sure that the government is referring to the same *Menendez* opinion that we are. There's a lot of opinions in that case. It's a District of New Jersey case at 132 F.Supp. 635; and specifically, 641 through 644.

The Court does go through the heightened showings that

the First Amendment and *McCormick* require for quid pro quo, and it goes on to dismiss several counts in the indictment for failure to include the appropriate allegations that --

THE COURT: What was the jump cite there, Mr. Dreeben? I got the 132 F.Supp. What was the jump pages?

MR. DREEBEN: It's 132 F.Supp. 3d. 635 is the initial cite, and the jump cite is 641, where the Court discusses the legal standards, and then at 643 through 644 dismisses three counts of the indictment and upholds two others.

THE COURT: Okay.

MR. DREEBEN: So I think this is not a totally unfamiliar process for a court to decide that the "in return for" aspect is not there. And this kind of, I think, will dovetail into the *Evans* point.

Evans and *McCormick* have given rise to, I think, a considerable amount of confusion in the lower courts because both cases are ostensibly campaign contributions. *McCormick* uses the explicit language. *Evans* doesn't walk that back, but it does talk about the crime consisting of receiving money, knowing that it's in return for a specific requested official action.

The important point that I think is relevant here to Your Honor's task on this motion is that this is not purely a question of subjective intent. The government's main theme in

its opposition is that, first of all, it has to do with *Lee* and *Hamling*; and second, this is all a question of intent for the jury.

But I don't think that that's quite right because the legal standard here, I think, was clearly stated in a Second Circuit case that the government cites and that we reply to called *United States versus Silver*, and that is 948 F.3d 538.

And what *Silver* says is there doesn't actually have to be a meeting of the minds between the politician and the contributor. It's not required that they actually agree. But what is required -- and I'm quoting here -- is "the intent the official conveys to the payor; i.e., that he will take or refrain from taking certain official action in return for payment."

And it goes on to say what matters is what the official manifested. Did he manifest a willingness to take payment for official action and inaction?

And if you lay that standard on top of the Port interaction, which Mr. Singer talked about as an example of a quid pro quo, you've got Mr. Sittenfeld talking about some -- before any mention of campaign contributions are there, he wants to get sports betting in the project as a logical use and for that financial consideration he (distorted audio).

And then you have the UC voluntarily trying to link the two together, payment and the zoning.

I don't understand how the causal effect can be presented when the intent that's been manifested by the public official on this indictment is, I'm in favor of doing this through zoning. Leaving aside whether that's an official act, that's what I want to do.

And the UC cited -- interjects his own gloss on it, trying to link it to the payments.

I think that that falls short of showing, on the face of the indictment, a manifestation that meets the *Evans* standard.

So on that basis, A, I think *Menendez* shows that the Court does apply a First Amendment standard. It does look for more here than simply the bare minimal *Hamling* notice standard when the government has gone beyond it at least; and B, the *Silver* objective test is right.

McDonnell makes it clear that even if, like, hypothetically, a public official was lying, and you say, like, I've got my fingers crossed behind my back, I'm not going to do what these guys want, I just want their money, that's still a crime. But what has to be shown is a manifestation.

So those are the points that I wanted to make on response to --

THE COURT: Well, let me follow up on your manifestation point with sort of a specific question and then a general thought.

And the specific question is paragraph 31 and 32 of the indictment. And I guess focusing in particular on Sittenfeld's allegedly responding, Yeah --

MR. DREEBEN: Yeah.

THE COURT: -- which maybe is a little ambiguous but could be read as, you know, they say, "Well, we'll take care of you. What you've just described is what we want." Plus says, "We're going to take care of you, but that's what we need."

Sittenfeld responds, "Yeah."

And then following further discussion, he accepts the money. So that's the sort of a specific thing, and I guess -- well, why don't you respond to that first.

MR. DREEBEN: So I think that that is fatally ambiguous in a context where you need an explicit quid pro quo. I don't think that it's enough to have statements that are, on their face, not clear.

"So today you hear me ... we're gonna take care of you, not a problem." I don't know exactly what that means. And then the next --

THE COURT: Those statements occur -- I guess this is my broader question. Those statements occur, as Mr. Singer correctly points out, in the context of a relationship that is, at this point, a year and a half-ish old, where there's been a lot of previous conduct and dealings

and, you know, money going one way and things happening on Project 1 the other way.

And, you know, don't we have to -- I mean, isn't it a fair point we have to read these specific comments also against the backdrop of a relationship? And doesn't that make you think it's at least a little bit a jury question more than a judge question?

MR. DREEBEN: Your Honor, Mr. Singer's submission was that we've already established that these guys are corrupt. Now, if the Court agrees with that on phase one, then that's the predicate for his argument.

If it agrees with our submission that they haven't crossed that line, then you've got guys who are aggressive, but they're aggressive with a political figure who has been longstanding -- his locked-in vision is I want to make this project happen.

And again, the government kind of cherry picks this and says, We'll focus on the sentence from the UCE and focus on the acceptance of the money and forget about the fact that the defendant has already volunteered what he wants to do. He's made it clear.

And I think that you have to ask yourself, in the context of a political indictment like this, what is the political figure supposed to do? Is he supposed to say, when somebody strays over the line every single time, like, "Whoa, that's

not me"?

He's already said to the confidential witness, "There can't be any quid pro quos here." He's engaged in a course of conduct that he believes is legit.

I think that it -- the backdrop that I hope the Court brings to the evaluation of this indictment is the point that Your Honor made, which is that in this context, the government shouldn't be able to take the contribution, the political action by the political official who supports what the contributors are doing, link the two, and say the jury can infer intent. That's our position on that statement.

I understand Your Honor's question about whether it goes over the line enough to get to the jury. We think it doesn't, and that would be the issue on that paragraph.

On their reliance on *Terry*, I think *Terry* is a very different case because there you have a judge who is engaging in clearly improper conduct. He's having *ex parte* communications about how to decide a motion on behalf of somebody who has made political contributions. It's made clear to him (distorted audio) corrupt.

That contrasts, I think, quite strikingly with what I think this indictment shows, which is a political figure connected to legitimate activities who is not doing things that are out of school, out of step, and therefore don't support the inference of something inappropriate in the

interaction as a whole.

So I think that *Terry* does actually have what is missing in this case.

And I think the final comment that I would make in response to the government is the points of *McDonnell* that Your Honor was pointing to about zoning, I think, put the zoning issue on the side of the line of too incipient, too abstract, not meeting concrete, focused standard that the Court was dealing with in *McDonnell*.

So *McDonnell*, on one end, says "Bob's For Jobs," a general program of job searching. As Your Honor correctly pointed out, that's more like Mr. Sittenfeld's general pro-development posture.

Then you have specific things, as in *McDonnell* always doing research study on a particular product. Who is going to be involved in that research study? That's on the specific side.

In between those, I think, is something like this, where you have Mr. Sittenfeld later saying, "I don't know. Could be zoning, could be bonding," doesn't really rise to a level of a concrete, focused official act. And therefore, if the Court does not agree with us on the broader explicit conduct element being missing here, then we submit that that's not the kind of official act that should go to a jury, where a jury can be permitted to find an official act when the legal standard is

not met.

THE COURT: Thank you, Mr. Dreeben.

Well, certainly, both sides have given the Court a lot to think about so I appreciate that.

MR. SINGER: Your Honor?

THE COURT: Go ahead, Mr. Singer.

MR. SINGER: May I make one point?

THE COURT: Sure.

MR. SINGER: I just wanted -- I wasn't necessarily as clear as I could have been on the *Menendez* point, and Mr. Dreeben raised that. There are a number of different *Menendez* opinions out there, but it was that *Menendez* case that Mr. Dreeben cited.

The government -- and I urge the Court to read that case. It is interesting. It does have substantial discussion relating to First Amendment concerns. It's in the Third Circuit so, obviously, it's not applying Sixth Circuit law.

The reason that I made the statement that the defendant has not cited to any cases in which the Court has applied a motion to dismiss in this context, and I said that partially with *Menendez* in mind, and that's because for the counts that the Court did not dismiss, it was because -- this is page 643 of *Menendez*. It was because that a particular paragraph -- in large part, a particular paragraph in the indictment used the *Evans* language, in that the campaign contributions were given

in exchange for specific requested exercises of public authority.

That's the same language that we have used in this indictment, that the contributions were made in return for specific official action.

The counts that were dismissed, on the other hand, were dismissed because they didn't include that language. They alleged that the funds were made in return for, quote, being influenced in the performance of official acts as opportunities arose.

So the Court was saying that those deserve dismissal because those are not alleging an explicit quid pro quo, which looks at specific official action. But, rather, in the campaign contract, the contribution context, they were alleging an "as opportunities arose" theory, which made them more generalized and not specific enough.

So that showed that while there were dismissed counts in that case, the ones that were not dismissed are the ones that mirrored the language that the government has used in this indictment.

THE COURT: I think Mr. Dreeben might say that, well, you know, "zoning or things like that" or something sort of sounds a little bit like an "as opportunities arise" kind of allegation.

MR. SINGER: So the zoning, that would go to the

official act. This is whether or not the quid pro quo was explicit or not. And because the "quid" is campaign contributions, the Court was looking at whether the allegations adequately alleged that quid, whether the campaign contributions were explicit for the quid pro quo. The Court held, because they used the *Evans* language, that it was.

THE COURT: I will go read the *Menendez* case and see if I can figure out what it says. But I appreciate that, Mr. Singer.

As the parties know, there are a couple of other motions pending before the Court. It was not the Court's intent to explore those motions at this point, but just wanted to make sure that the parties were in agreement for that.

Mr. Singer?

MR. SINGER: Yes, Your Honor.

THE COURT: Mr. Dreeben?

MR. DREEBEN: Yes, Your Honor.

THE COURT: Very good. Well, then, I think I've heard what I need from the parties.

Mr. Dreeben, if you want a last word, in light of what you just heard Mr. Singer say, I'll give you 30 seconds since I always feel like the defendant should have the last word on their motion, but that's about it.

MR. DREEBEN: Your Honor, I'm confident that in your reading of *Menendez*, if you go back, that Mr. Singer pointed

to what favors him. I think there is language in there that also favors us.

And I think the broader point is that in a context of this sensitivity, the Court does have the power and responsibility to ensure that the government cannot simply link a political action and contribution solicitation and say it's all up to the jury.

THE COURT: Very good. All right. Well, thank you both. Your papers were very helpful. The argument today has been very helpful to the Court so I appreciate your preparation and your assistance with the Court's questions.

The Court will take the matter under advisement and issue a decision as promptly as it can.

Scott, I think we're ready to stand in recess.

(Proceedings concluded at 3:57 p.m.)

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C E R T I F I C A T E

I, M. SUE LOPREATO, RMR, CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled case.

/s/ M. Sue Lopreato
M. SUE LOPREATO, RMR, CRR
Official Court Reporter

March 5, 2021
Date of Certification